



[Billing Code 7709-02-P]

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4901

RIN 1212-AB43

Examination and Copying of PBGC Records

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: In accordance with the FOIA Improvement Act of 2016, this rule amends the regulation of the Pension Benefit Guaranty Corporation that governs the examination and copying of PBGC records.

DATES: *Effective date:* [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability date: Like the provisions of the FOIA Improvement Act of 2016 that this rule incorporates, and which PBGC has been following since the Act became effective on June 30, 2016, the amendments in this rule apply to requests for records under the Freedom of Information Act that are made after June 30, 2016.

FOR FURTHER INFORMATION CONTACT: Samantha M. Lowen

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SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of the rule

This rule is needed to incorporate changes to the Freedom of Information Act made by the FOIA Improvement Act of 2016. Authority for this rule is provided by section 4002(b)(3) of the Employee Retirement Income Security Act of 1974 and the FOIA Improvement Act of 2016.

Major provisions of the rule

This rule provides for an electronic reading room for records, expands the categories of records in the reading room, updates the standard for disclosure, requires additional notice to requesters about FOIA resources, extends the appeal deadline, and places restrictions on fees.

Background

The Pension Benefit Guaranty Corporation (PBGC) is amending its regulation on Examination and Copying of PBGC Records (29 CFR part 4901) (FOIA regulation) to incorporate statutory changes to the Freedom of Information Act (5 U.S.C. 551 *et seq.*) (FOIA). The majority of the regulatory changes are specifically required by the FOIA Improvement Act of 2016 (2016 Act). Section 3 of the 2016 Act requires federal agencies to review their FOIA regulations and to make conforming amendments, as necessary, to incorporate the 2016 Act's changes to the FOIA. In addition to the changes required under the 2016 Act, PBGC is making one other amendment to its FOIA regulation that incorporates a previous statutory change under the Open Government Act of 2007 (2007 Act).

Regulatory Changes

Electronic Reading Room

PBGC is amending §§ 4901.3, 4901.4, and 4901.5 of its FOIA regulation by replacing the references to PBGC’s “public reference room” with references to its “electronic reading room.”

Before the 2016 Act, the FOIA required agencies to affirmatively make certain categories of records “available for public inspection and copying” without prompting by formal request. Like most agencies, PBGC complied with this requirement by maintaining a physical “reference room” to house these records (and indices thereto), which members of the public could inspect and copy in person. The e-FOIA Amendments of 1996 (1996 Act) provided that agencies could supplement or entirely replace their physical reading rooms with electronic reading rooms, where members of the public could access the affirmatively disclosed material online. Consistent with the 1996 Act, PBGC began maintaining an electronic reading room several years ago. The 2016 Act further modernized the FOIA by replacing the requirement to make these records “available for public inspection and copying” with the requirement to make them “available for public inspection in an electronic format.” Under the 2016 Act, physical reading rooms are effectively obsolete.

Consistent with these revisions to the FOIA, PBGC is amending its FOIA regulation by removing the now outdated references to PBGC’s public reference room and adding a description (including the location) of PBGC’s electronic reading room.

Affirmative Disclosure of Certain Records

PBGC is amending § 4901.4 of its FOIA regulation to include two additional types of records in its electronic reading room.

Both the 2007 Act and the 2016 Act added to the list of records that agencies must disclose without formal request. As amended, the FOIA requires each agency to affirmatively release certain records that the agency determines are likely to be the subject of future requests, as well as certain others that have been the subject of three or more requests. The FOIA also requires agencies to redact such records to the extent necessary to protect personal privacy interests before adding them to the electronic reading room.

Consistent with this change, PBGC is amending the list of records available in its electronic reading room at § 4901.4.

Foreseeable Harm

PBGC is amending § 4901.5 of its FOIA regulation to incorporate the 2016 Act's "foreseeable harm" standard for responsive disclosures.

The 2016 Act provides that an agency should only withhold information under the FOIA "if the agency reasonably foresees that disclosure would harm an interest protected by an exemption [under the FOIA]" or if disclosure is otherwise prohibited by law. Accordingly, PBGC is amending § 4901.5, which sets forth PBGC's general policy of openness under the FOIA, by adding this foreseeable harm exception to disclosure.

Additional Notice to Requesters

PBGC is amending § 4901.14 of its FOIA regulation to incorporate the additional notice requirements to requesters of certain resources available to them. The 2016 Act requires an agency, when issuing a determination to a requester, to offer the services of the agency's FOIA Public Liaison and, if the determination is adverse, to notify the requester of the services provided by the Office of Government Information Services (OGIS).¹ Accordingly, PBGC is

¹ OGIS is an office of the National Archives and Records Administration that provides dispute resolution services under the FOIA. See 5 U.S.C. 552(h).

amending § 4901.14 by adding these notice requirements to PBGC’s obligations when responding to FOIA requests.

Appeal Deadline

PBGC is amending § 4901.15 of its FOIA regulation by increasing the appeal deadline from 30 to 90 days, in conformity with the 90-day minimum time period established by the 2016 Act.

Fee Exception

PBGC is amending § 4901.31 of its FOIA regulation to include new restrictions under the 2016 Act on PBGC’s ability to charge fees in certain situations. Under the amended regulation, if PBGC fails to respond to a request within the time specified under paragraph (a)(6) of the FOIA, PBGC generally may not charge the applicable search or duplication fees unless specific conditions—established by the 2016 Act—have been met.

Compliance with Rulemaking Guidelines

PBGC has determined that this rulemaking is not a “significant regulatory action” under Executive Order 12866. Accordingly, Executive Order 13771 does not apply to this rule, and the rule has not been reviewed by the Office of Management and Budget under Executive Order 12866.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Although this is not a significant regulatory action under Executive Order 12866, PBGC has examined the economic implications of this final rule. PBGC has concluded that because these proposed amendments incorporate statutory changes that facilitate the public's access to PBGC records under the FOIA at no additional cost, these regulatory amendments result in a net benefit to the public.

The amendments of PBGC's FOIA regulation contained herein concern matters of agency procedure and practice. They provide additional protection to the public and are being adopted in accordance with the provisions of the 2016 Act. Pursuant to 5 U.S.C. 553(b), general notice of proposed rulemaking is not required. Because no general notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601.

List of Subjects in 29 CFR Part 4901

Freedom of information.

In consideration of the foregoing, PBGC is amending 29 CFR part 4901 as follows.

PART 4901—EXAMINATION AND COPYING OF PENSION BENEFIT GUARANTY CORPORATION RECORDS

1. The authority citation for part 4901 continues to read as follows:

Authority: 5 U.S.C. 552, 29 U.S.C. 1302(b)(3), E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

2. Revise § 4901.3 to read as follows:

§ 4901.3 Electronic reading room.

The PBGC will maintain an electronic reading room on its website, www.pbgc.gov, where persons may inspect in an electronic format all records made available for such purposes under this part.

3. Amend § 4901.4 as follows:

a. Revise the section heading and introductory text.

b. In paragraph (d)(1), remove the comma at the end of the paragraph and add a semicolon in its place.

c. In paragraphs (d)(2) and (3), remove “, and” and add a semicolon in its place.

d. Add paragraphs (d)(4) and (5).

The revisions and additions read as follows:

§ 4901.4 Information maintained in electronic reading room.

The PBGC shall make available for public inspection in an electronic format without formal request—

* * * * *

(d) * * *

(4) *Frequently requested records.* Records that have been released under 5 U.S.C. 552(a)(3) and have been the subject of three or more requests; and

(5) *Other records.* Records that have been released under 5 U.S.C. 552(a)(3) and that PBGC determines, because of the nature of the records’ subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records; and

* * * * *

§ 4901.5 [Amended]

4. In § 4901.5, amend paragraph (a) by:

a. Removing “exempt from disclosure” and adding in its place “PBGC reasonably foresees that disclosure would harm an interest protected by an exemption”;

b. Adding the words “or disclosure is otherwise prohibited by law” after the words “subpart C of this part”; and

c. Removing the two instances of “public reference” and adding in the place of each “electronic reading”.

§ 4901.14 [Amended]

5. In § 4901.14:

a. Amend paragraph (a) by adding, at the end of the paragraph, the sentence “When responding to a request under paragraph (b), (c), or (d) of this section, the disclosure officer will notify the requester of the requester’s right to seek assistance from the PBGC’s FOIA Public Liaison and will provide information about how to contact the FOIA Public Liaison.”

b. Amend paragraph (c) by removing “denial and outline the appeal procedure available” and adding in its place “denial, outline the appeal procedure available, and notify the requester of the right to seek dispute resolution services from the PBGC’s FOIA Public Liaison or the Office of Government Information Services”.

c. Amend paragraph (d) by adding “and notice of the requester’s right to seek dispute resolution services from the PBGC’s FOIA Public Liaison or the Office of Government Information Services” after the word “circumstances”.

§ 4901.15 [Amended]

6. In § 4901.15, amend paragraph (a) by removing the two instances of the words “30 days” and adding in the place of each “90 days”.

7. In § 4901.31:

a. Amend paragraph (a) introductory text by adding, at the end of the paragraph, the sentence “Except as provided in paragraph (e) of this section, no charge for searching (or in the case of a requester described under 5 U.S.C. 552(a)(4)(A)(ii)(II), for duplication) will be assessed if PBGC has failed to comply with any time limit under 5 U.S.C. 552(a)(6).”

b. Add paragraph (e).

The addition reads as follows:

§ 4901.31 Charges for services.

* * * * *

(e) *Unusual or exceptional circumstances.* Notwithstanding paragraph (a) of this section, if PBGC fails to comply with a time limit under 5 U.S.C. 552(a)(6), PBGC may nevertheless assess a charge for searching (or in the case of a requester described under 5 U.S.C.

552(a)(4)(A)(ii)(II), for duplication) if either paragraph (e)(1) or (2) of this section applies:

(1) PBGC has determined that unusual circumstances apply and that more than 5,000 pages are necessary to respond to the request, provided that:

(i) PBGC has provided timely written notice of this determination to the requester; and

(ii) PBGC has discussed with the requester—or made three or more good-faith attempts to do so—via written mail, electronic mail, or telephone how the requester could effectively limit the scope of the request.

(2) A court has determined that exceptional circumstances exist (as defined in 5 U.S.C. 552(a)(6)(C)) and has issued an order excusing PBGC’s failure to comply with the time limit.

Issued in Washington, DC, by

W. Thomas Reeder,

Director,

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Corporation.

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